

Appendix 5F

Training Memo—Addressing Uncharged Sexual Abuse in Domestic Violence Cases¹

“(T)he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent [and] contract the wife hath given up herself in this kind unto her husband, which she cannot retract.... (I)n marriage she hath given up her body to her husband.” Commonwealth v. Chretien, 417 N.E. 2d 1203, 1207 (Mass. 1981) (quoting Hale, Pleas of the Crown 628 (1800)).

Lord Hale’s decision was criticized in the dissent when it was written in 1800, as well as by many modern opinions. Despite the criticism of that decision and others like it, many jurisdictions still restrict the charges that can be filed against intimate partner rapists. In those jurisdictions with laws that do not protect an intimate partner rapist from prosecution, societal attitudes often contribute to verdicts that achieve the same result: exempting the intimate partner rapist from criminal liability. As a result, although abusers commonly use sexual abuse as a tactic to control and humiliate their victims, Lord Hale’s pronouncement that women “give up their bodies to their husbands” has not been completely extinguished. Due to these attitudes, as well as the complicated feelings victims may feel about being raped by an intimate partner, victims are often reluctant to reveal or prosecute their sexually abusive partners.

This memo seeks to offer prosecutors guidance regarding charging and prosecuting intimate partner violence, and to offer strategies to address sexual abuse perpetrated against an intimate partner, even when sexual offenses cannot be charged in the criminal prosecution.

Sexual and Physical Abuse Often Co-occur in Violent Relationships

Although some intimate partner assailants limit their violence to sexual assault, the majority of intimate partner sexual assaults occur within physically abusive relationships.² In seven out of every ten sexual assaults, the defendant is the victim’s intimate partner, other relative, friend or acquaintance.³

Perpetrators of intimate partner sexual assault violate their victims physically and emotionally. An intimate partner rapist is someone with whom the victim shares her life, home and possibly children. Victims, therefore, are faced with “a betrayal of trust and intimacy”⁴ as well as a physical violation of their bodies.

¹ Prepared by Jennifer G. Long, Director, and Jenifer Markowitz, Medical Advisor, AEquitas: The Prosecutors’ Resource on Violence Against Women, (2009).

² See, e.g., Jennifer A. Bennice and Patricia A. Resick, *Marital Rape: History Research and Practice*, 4 TRAUMA, VIOLENCE AND ABUSE 3, 231, 234 (July 2003) (stating “Marital Rape is more prevalent among women who also experience physical abuse within their intimate relationships.”).

³ U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NATIONAL CRIME VICTIMIZATION SURVEY (2005), http://www.ojp.usdoj.gov/bjs/cvict_c.htm#relate.

⁴ Patricia Mahoney, M.A., *The Wife Rape Fact Sheet*, National Violence Against Women Prevention Research Center, Wellesley Centers for Women, Wellesley College Stone Center, <http://www.musc.edu/vawprevention/research/wiferape.shtml> (last visited Aug. 21, 2009).

Domestic Violence Victims' May Not Disclose Sexual Abuse to Law Enforcement

Victims of intimate partner sexual assault often do not disclose⁵ or delay reporting their assault.⁶ Further, victims' disclosures are often piecemeal and indirect, requiring prosecutors to listen carefully in the victim interview for details, which may suggest that a sexual assault has also occurred. For example, a victim may state that she was naked during the assault or may state that the assault happened in the bedroom. The victim's disclosure of these details suggest the possibility of a sexual assault and require follow up questions by the prosecutor and attentive dialogue with the victim. It is important to listen carefully and follow up on the victim's cues.

This scenario illustrates the necessity of building a rapport with victims so that they trust you enough to disclose their assault. Given the large caseloads under which many prosecutors operate, however, it is not always possible for the prosecutor to meet early or often enough with the victim to establish a rapport. Prosecutors should work closely with their victim witness advocates and community-based advocates to ensure that the victim is supported and has someone with whom she can maintain more consistent communication about her case.

Domestic Violence Victims May Disclose to Medical Treatment Providers

Although victims of intimate partner violence may not disclose sexual assault to law enforcement, they may disclose to healthcare professionals. Disclosures of this nature could occur under 3 different circumstances:

1. During emergency treatment for injuries following the assault;
2. During a primary care visit, either in response to specific screening questions, or because the victim is concerned about specific health consequences from the assault (e.g. pregnancy; sexually transmitted infections); and
3. During an anonymous sexual assault medical-forensic examination (also known as a "Jane Doe Kit").

States vary greatly in regard to mandatory sexual assault reporting laws; many states don't require clinicians to report sexual assault of a competent adult. Even in states where clinicians are mandatory reporters, the report may not necessarily have to include victim identifiers; only that treatment of a victim of sexual assault has taken place. Anecdotal reports suggest that states without specific reporting requirements may have higher numbers of victims disclosing in the healthcare setting, although there is little research on the impact of mandatory reporting laws on sexual assault disclosures. What is clear is that victims do not generally support these types of laws, citing unintended consequences, such as possible revictimization from the criminal justice system⁷.

Federal law has created opportunity for greater numbers of victims to obtain medical-forensic examinations without requiring a report to law enforcement. Under the 2005 reauthorization of the

⁵ See e.g., Sarah M. Buel, *50 Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, Family Violence, 28 THE COLORADO LAWYER 10, (Oct. 1999).

⁶ *Id.*

⁷ Cris M. Sullivan and Leslie A. Hagan, *Survivors' Opinions About Mandatory Reporting of Domestic Violence and Sexual Assault by Medical Professionals*, 20 AFFILIA 3, 346-361 (2005).

Violence Against Women Act, victims of sexual assault can no longer be compelled to work with law enforcement in order to have the medical-forensic examination⁸. As a result, clinicians have greater flexibility to focus on victims' healthcare needs and all of the factors that contribute to their health and safety, including their relationship to the assailant.

Even in the absence of forensic evidence collection ("rape kit"), disclosure to healthcare providers, such as SANEs or emergency medicine physicians can result in injury documentation including photographs and traumagrams⁹ and detailed assault histories, which may be of use in prosecuting these cases. In addition, these medical professionals can make referrals to victim advocacy and mental health professionals for the victim's ongoing safety and support regardless of whether criminal charges proceed.

Barriers Exist to the Prosecution of Intimate Partner Sexual Assault

Victims of intimate partner sexual assault may vacillate in their cooperation or interest in moving forward on the sexual assault case. There are many reasons for this. First, some victims do not recognize their rape as an assault.¹⁰ Some believe that the law protects their rapists. Some believe that a spouse has the right to rape his wife and use religious texts to justify their beliefs. Others rely on their partners' insistence that spouses or other intimate partners who have previously given consent to a partner cannot withdraw it. Some in society share these views, and, therefore, many victims, police and even some prosecutors are reluctant to go forward with these cases.

Another barrier is the victim's current or former relationship with the defendant, which can lead the victim to blame herself. In addition, there are often complex feelings involved; a "victim may love the offender but hate the offense."¹¹

Victims may also "consent" to subsequent sexual activity with their abuser after the assault. These behaviors are not uncommon and highlight the complexity of intimate partner sexual assaults and the challenges in pursuing these cases.¹²

Addressing Sexual Assault in a Domestic Violence Plea or Sentence

Notwithstanding the barriers, many victims of intimate partner sexual assault want their abusers held accountable for sexual assault. Even when a victim discloses a sexual assault but is unable to testify about it in open court, or when the disclosure of sexual abuse occurs too late in the proceedings to

⁸ 42 U.S.C.A. § 3796gg-4 (d)(1) (West 2009) ("Nothing in this section shall be construed to permit a State, Indian tribal government, or territorial government to require a victim of sexual assault to participate in the criminal justice system or cooperate with law enforcement in order to be provided with a forensic medical exam, reimbursement for charges incurred on account of such an exam, or both.").

⁹ Also known as a body map; the simple line drawings often used in trauma cases to map out distribution of injury on a patient.

¹⁰ Lynn Hecht Schafran, Stefanie Lopez-Boy, and Mary Rothwell Davis, *Making Marital Rape a Crime: A Long Road Traveled, A Long Way to Go*, 10 CONNECTIONS 1, (Spring/ Summer 2008).

¹¹ Mahoney, *supra* note 4.

¹² Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual Assault and Domestic Violence Cases*, National District Attorneys Association (2007); see also Jennifer G. Long, *Prosecuting Intimate Partner Sexual Assault*, 2 THE VOICE 2 (2008).

include sexual assault charges in the prosecution,¹³ there are still strategies a prosecutor can use to ensure that the sentence addresses both the physical and sexual aspects of the abuse he has perpetrated:

- Make sure that the pre-sentence investigator is aware of the sexual abuse.
- If possible, the victim should be encouraged to testify about the sexual abuse at the sentencing hearing and explain why she was unable to disclose the sexual abuse sooner.
- Prosecutors should work with advocates and probation officers to identify probation conditions that will address a defendant's sexual abuse of his partner and ask the sentencing court to impose these conditions. This may include requiring alleged sex offenders to attend treatment that includes a sex offender component.
- In addition, prosecutors should ensure that any conditions of probation include broad prohibitions against future physical or sexual abuse, so that a defendant is accountable for any future abuse of his victim.

Finally, it is imperative in this process to consider the issue of lethality as well. Research underscores that forced sex as a component of intimate partner violence relationships increases the risk of lethality seven-fold. In fact, in a list of 17 risk factors for intimate partner homicide, forced sex was the 5th most predictive factor.¹⁴

Conclusion

Victims of intimate partner sexual violence face significant collateral that may be aggravated by their decision to cooperate in the prosecution of their abuser. Prosecutors, therefore, should use a multi-disciplinary team (MDT) approach to these cases.¹⁵ Prosecutors should also ensure that any MDT includes someone who can work with the victim to address sexual and physical violence and create a supportive atmosphere in which they can continue to disclose all forms of abuse.

Recommendations for Practice

Notwithstanding the limitations on the law or victims' ability to cooperate in a sexual assault prosecution, there are steps prosecutors can take to address sexual violence in a physically abusive relationship:

- Work closely with victim advocates and build a rapport with victims so they are comfortable and able to disclose sexual violence.
- Work closely with victim advocates to conduct lethality assessments and safety planning.

¹³ Discovery rules, due process provisions, and constitutional prohibitions against double jeopardy may prohibit the filing of these charges if the disclosure occurs too late in the prosecution.

¹⁴ Jacquelyn C. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, NATIONAL INSTITUTE OF JUSTICE JOURNAL, 250, 14-19 (Nov. 2003), available at <http://www.ncjrs.gov/pdffiles1/jr000250e.pdf>.

¹⁵ See, e.g., Jennifer G. Long and Viktoria Kristiansson, *Taking a Process-Oriented Approach to Domestic Violence Prosecutions*, 1 THE VOICE 9 (2007).

- If the sexual assault is charged be prepared to argue the issue of increased lethality risk in bail/bond hearings, be prepared to explain to the victim why sexual assault charges cannot be prosecuted based on the law.
- Listen to the victim and understand her reasons if she does not want to proceed on sexual assault charges. Even if you disagree and determine that the case must be prosecuted, this will help show respect and understanding.
- Identify victim advocates in the community who can work with the victim to address the harm caused by the sexual violence.
- Identify Batterer Intervention Programs (BIPs), which include a sex offender component in their curricula.
- Ensure that evidence of sexual violence is relayed to Pre-Sentence Investigator and if possible, to the sentencing judge.
- Work with BIPs to ensure that batterers who use sexual violence are required to attend extra sessions, which address use of sexual violence by batterers.
- Ensure that probation conditions prohibiting violence specifically prohibit sexual violence.